

b. While the new Declaration does not improperly cite claim numbers of the Kurth application, said Declaration does incorporate the deficiencies of the Kurth Declaration filed November 22, 2005, in section 7 and in Exhibit A of said Declaration.

c. The scope of the declaration is not commensurate in scope with the presently claimed invention. Note MPEP 715.02.

d. No documentary evidence of the facts have been submitted with said declaration. Note MPEP 715.07, I, III.

e. The date to swear behind is the effective filing date of the Kurth reference 220/0090488, which is October 10, 2000, not 2001 as recited in section 6 of said Declaration---”.

Taking each of the Examiner’s objections to the 131 Declaration:

A] Section 3 of the Declaration only mentions application 09/974,301 because that is the application in which Kurth executed the Affidavit that comprises the documented proof of prior conception by the present inventors. The Examiner’s attention is directed to the fact that section 3 refers to Kurth as the person to whom the conception of the invention was described by the present inventors. He is merely identified as the inventor named in the 09/974,301 application for convenience sake. He could just as easily have been identified by referring to his being named in the 2002/0090488 application, since they are both one and the same person. The fact remains that Kurth, the inventor named in the 2002/0090488 application (as well as the 09/974,301 application), is the person to whom the conception of the invention was described by applicants.

B] This ground of objection is not understood. Of course the Kurth declaration is “incorporated” into the 131 Declaration since it constitutes the documentary evidence

upon which the allegations made in the 131 declaration were based. Applicants can conceive of no other way to make the evidence contained in the Kurth declaration a part of the 131 declaration other than to refer to it in section 7 (or some other portion of the declaration).

C] The Examiner has not explained just how the “scope of the declaration is not commensurate in scope with the presently claimed invention”. Section 3 of the 131 declaration states that the conception of the invention described in the present application was disclosed to Kurth in 1999. By express definition, therefore, the 131 declaration is at least commensurate in scope with the invention claimed in the application.

D] Applicants are also at a loss to understand the Examiner’s statement that “no documentary evidence of the facts has been submitted”. The documentary evidence supporting the allegations of prior conception of the claimed invention in the 131 declaration is contained in the Kurth declaration. Indeed, what better documentary evidence exist than the sworn testimony of the inventor named in the prior art patent reference that the applicants named herein conceived of the invention before he did?

E] The Examiner is, of course, correct in stating that the date to swear behind is the effective filing date of the Kurth reference 2002/0090488, which is October 10, 2000, not 2001. Although section 6 of the 131 declaration states, “2001”, the evidence nevertheless establishes conception prior to 2000. See section III A) of the Kurth declaration. It is respectfully submitted that a 131 declaration is sufficient for what it proves and not for what it may be interpreted as saying. “Swearing behind” October 10, 2000 is equivalent to “swearing behind” 2001 provided that the evidence presented to buttress the “swearing behind” supports the fact.

However, in order to remove any doubt on the Examiner's part, a new 131 declaration, identical to the previous 131 declaration, except with respect to the dates recited in sections 2 and 6 and the application serial no. in section 3 is attached. Inasmuch as the evidence presented herewith is sufficient to support these changes, no new issues are presented by the new 131 declaration.

Accordingly, it is respectfully submitted that the 131 declaration is sufficient to swear behind the prior art relied upon by the Examiner. Accordingly, withdrawal of the prior art rejection is respectfully requested.

Again, applicants will submit an appropriate terminal disclaimer upon an indication of allowable subject matter.

Applicants have earnestly endeavored to place the application in condition for allowance and an early action toward that end is respectfully requested.

The Commissioner is hereby authorized to charge to Deposit Account No. 50-1165 (T2317-907720) any fees under 37 C.F.R. §§ 1.16 and 1.17 that may be required by this paper and to credit any overpayment to that Account. If any extension of time is required in connection with the filing of this paper and has not been separately requested, such extension is hereby requested.

Respectfully submitted,

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